No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1951

JOSEPH EDWARD MORISSETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court overruling petitioner's motion for a new trial (Pet. 21–23) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 56–85) are reported at 187 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1951 (R. 55). The petition for writ of certiorari was filed on March 6, 1951, and granted on May 7, 1951 (R. 87). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under 18 U. S. C. 641, one who "knowingly converts to his use" property of the United States, must have acted with the felonious intent required in common law larceny.

2. Whether the trial judge properly refused to submit to the jury the question of whether the United States had in fact abandoned the bomb casings taken by petitioner.

3. Whether the trial judge properly refused to submit to the jury the petitioner's defense that he believed the bomb casings had been abandoned.

4. Whether the trial judge correctly refused to instruct the jury that an open and notorious taking would create "a strong presumption" that the petitioner lacked a felonious intent.

5. Whether the trial judge invaded the province of the jury.

STATUTE INVOLVED

18 U. S. C. (1948) 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the

same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT

The petitioner was tried, convicted, and sentenced to two months imprisonment or to pay a fine of $200 and costs (R. 51–52), under an indictment charging that on or about December 2, 1948, he "did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18" (R. 3).

The evidence adduced at the trial may be summarized as follows: The United States had leased land from the Conservation Department and Department of Agriculture of the State of Michigan for use as a practice bombing range at the Oscoda Air Base (R. 9, 12). Signs had been

placed around the entire area warning persons that they were not permitted on the premises (R. 7, 11, 14–15, 17, 19, 20, 21, 36). The sign at the entrance to the bombing area read "Danger, Keep Out, Bomber Range" (R. 7), and other signs warned, "United States Government Property—Stay Off" (R. 17). The practice bomb used consisted of a steel bomb casing about 3½ feet long, 8 inches in diameter, and 16 pounds in weight, with "recognizable" tail fins (R. 8, 23). The bomb was filled with 100 pounds of sand and a three-pound charge of black powder (R. 8). This particular type of casing had been used at least as far back as 1944 (R. 13). After practice bombing, the spent casings were cleared from the target area and placed in piles at the edge of the range (R. 8). There was testimony and photographic evidence to the effect that the used bomb casings had rusted to a varying degree from exposure to the weather (R. 14, 28, 34–35).

Petitioner, aged 27, operated a fruit business during the summer and worked as a junk dealer during the winter. He testified that he had "been buying junk off and on" for three to four years "all over Michigan." (R. 27, 31.) One dealer saw him once or twice each week in the fall and winter for two years (R. 26–27). On November 22 or 23, 1948, petitioner and his brother-in-law, one Atchison, were hunting deer on the Oscoda Army Air Base. Such hunting was not permitted

(R. 7), but it was apparently done by others as well as by petitioner (R. 12, 18–19, 20–21, 23, 28, 36). Petitioner and Atchison, during daylight hours, piled about three tons of the bomb casings on petitioner's truck and took them, in two trips, to the farm of Atchison's uncle about 20 miles away. They testified that during the loading they talked to some other hunters who came by. (R. 18–19, 22, 28–29.) At the farm, the casings were placed in a field with six or seven tons of other junk, in "plain view" of the road, but about 165 feet way from it (R. 19, 29), and petitioner and Atchison crushed the casings with a tractor so that petitioner could carry more of them on his truck (R. 18, 19, 22, 29).

Petitioner admitted that he was familiar with the signs around the bombing range and knew, at the time of the taking, that the casings were on government property (R. 31, 35).[1] He also

[1] Thus, at R. 35:

"Q. It was still on property of the United States Government, wasn't it, when you picked it up?

"A. I guess it was.

"Q. You guess it was. Don't you know?

"A. I didn't know at the time, no.

"Q. Didn't you testify you hunted on the bombing range?

"A. I did.

"Q. Isn't the bombing range government property?

"A. It is if it is marked. There is some State land around there, too.

"The Court. You knew it wasn't your property, didn't you?

"A. Yes.

"The Court. Didn't you say on cross-examination you

admitted that he did not have permission to be on the bombing range or to take the casings but thought the casings had been "thrown away" or "abandoned" (R. 34–35). The commanding officer of the air base testified that on and before December 1, 1948, he did not have authority to dispose of the used casings (R. 8), and that petitioner did not at any time ask his permission to take them (R. 14).

On or about December 2, 1948, at about 1:30 or 2:00 p. m. petitioner loaded the bomb casings on his truck and started from the farm toward Flint, Michigan, for the purpose of selling them (R. 22, 33–34). John Wagner, upon seeing the bomb casings on the truck, stopped petitioner at a road junction and, according to his testimony, "told [petitioner] he was taking a chance, advised him to take [the bomb casings] back where he got them" (R. 16–17). Petitioner denied this portion of the conversation, and asserted that Wagner merely stated that "he had some scrap over to his place he wanted to sell"

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knew this was government property where you got the bomb casings, didn't you say that?

"A. Yes, sir.

"Q. In your statement, Mr. Morissette, didn't you say you were hunting deer on the United States Government Air Force bombing range at Oscoda, Michigan?

"A. Yes.

"Q. You knew that was government property then, didn't you?

"A. Yes."

and asked what petitioner had on the truck (R. 30). Leo May, who also saw petitioner at the road junction, testified that "in the scrap drive for the Chamber of Commerce and Agriculture we tried to get [the bomb casings] and couldn't get them. I wondered why anybody else could get them when we couldn't get them for our scrap drive." He reported the matter to his father, an employee at the air base. (R. 5.)

Arriving at Flint with his load, petitioner sold the three tons of casings at $28.00 per ton, or a total of $84.00, to the Laro Coal and Iron Company (R. 20, 22–23, 25–26, 30–31).

The day after Leo May told his father about seeing petitioner's truck with the bomb casings, the elder May informed the commanding officer of the base, who in turn notified the State Police and the Criminal Investigation Division at Selfridge Field, of which Oscoda was a sub-base (R. 6, 7, 14). On December 10, 1948, when a State policeman stopped petitioner on the highway and inquired if he had taken some bomb casings from the air base, petitioner admitted that he had done so without permission and sold three tons of the casings at $28.00 per ton (R. 20). On January 20, 1949, after learning that a Federal Bureau of Investigation agent desired to talk with him, petitioner went to the F. B. I. office in Flint and made and signed a statement, which was introduced in evidence without objection. In this

statement, petitioner admitted the sale of three tons of bomb casings for a total of about $85.00, and said: "* * * We did not get any deer so we decided to make our hunting trip pay by loading up my 2 ton, 1948 red Studebaker with the bomb casings. * * * I told [the owner of the farm to which the casings were taken] my load at the time consisted of bomb casings that I wanted to smash together so that I could carry more on my truck * * *. I knew the bomb casings were at one time U. S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were." (R. 21–23.)

The issues in this case arise out of the trial judge's charge to the jury and the petitioner's requested instructions which the trial judge refused to give. The petitioner requested an instruction (R. 50) that—

> Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.

The trial judge refused to give this instruction, but instead charged the jury (R. 47) that,

> In every crime there must be an intent to do the thing that the person does. For example, if you walk away with a thousand dollars in your pocket that you don't know

is there, you hadn't intended to steal that thousand dollars at all. There is no intent. But the question is here. Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it.

After the jury had retired, the petitioner excepted to the charge as follows (R. 49–50):

Mr. TRANSUE: The objection is this, as I understand the court's charge, that the taking is the intent.

The COURT: No. I leave the question to them whether he intended to take it. He says he did.

Mr. TRANSUE: But the taking must have been with a felonious intent.

The COURT: That is presumed by his own act.

Mr. TRANSUE: That is my exception.

The COURT: All right.

Mr. TRANSUE: That the felonious taking cannot be derived just from the taking.

The COURT: All right, overruled.

The petitioner requested an instruction (R. 50) that,

* * * if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

The trial judge refused to give this instruction (R. 42–44), refused to permit the petitioner's counsel to argue such defense to the jury (R. 42), and charged the jury, in effect, that the defense of a belief that the casings had been abandoned could not be asserted by one taking personal property from land belonging to another person (R. 47–48).

The trial judge also refused to give the following instruction requested by the defendant (R. 50):

> If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized.

The portion of the charge to the jury which gives rise to the petitioner's contention that the trial judge directed a verdict of guilty, is set forth in this brief at pp. 41–42, *infra*.

The jury having found petitioner guilty, the court sentenced him to two months' imprisonment, or to pay a fine of $200.00, together with costs (R. 51–52). The court denied petitioner's motion for a new trial (R. 53, and see Pet. 21–23), and on appeal the Court of Appeals affirmed, one judge dissenting (R. 55).

SUMMARY OF ARGUMENT

I

Both courts below correctly held that the phrase "knowingly converts to his use", as used in 18 U. S. C. 641, does not import the specific or felonious intent of common-law larceny. Both the language and its history make clear that it covers every deliberate and unjustified taking of government property. The disjunctive use of "knowingly converts", together with the normal meaning of those words, defines an offense which is committed by one who voluntarily converts to his own use personal property of the United States. The clear legislative purpose to provide greater protection for government property than is afforded by technical common-law larceny and embezzlement would be frustrated by reading into the words "knowingly converts" the element of a felonious intent, i. e., a subjective evil purpose.

II

Since the undisputed evidence was to the effect that the United States had not intended to abandon the bomb casings, the trial judge properly withheld from the jury any issue as to abandonment. Abandonment by the United States of its personal property should not be inferred from circumstances, for the same reasons which pre-

clude anyone from obtaining by adverse possession title to lands of the United States.

III

The trial judge's refusal to submit to the jury petitioner's justification or defense that he had taken the casings in the belief that they were abandoned was correct in that, by analogy to the law of finders, the petitioner was under a duty to inquire whether the United States as the known owner of the land had abandoned the casings. Failure to inquire under these circumstances would preclude such a defense even under a charge of common-law larceny (with its requirement of felonious intent) and does so, *a fortiori*, where the charge is under Section 641.

IV

Since a charge of "knowingly" converting to one's own use under Section 641 does not require proof of the felonious intent which is an ingredient of larceny, the petitioner was not entitled to an instruction that his taking of the casings was so open and notorious and accompanied by such a bona fide claim of title or right as to create a "strong presumption" that the taking was without "felonious intent". In view of his failure to inquire of the known owner as to whether the casings had been abandoned, the taking, even if sufficiently open and notorious, was not accom-

panied by such a claim of right made in good faith as would justify such an instruction even under a charge of common-law larceny.

V

In instructing the jury that if they believed either petitioner's or the government's versions of the facts, they should find the petitioner guilty, the trial judge was not usurping the jury's function. In effect, he told them that the admitted facts constituted a violation of Section 641, but this was not reversible error since he also instructed them that theirs was the power to determine the petitioner's innocence or guilt.

ARGUMENT

I

THE COURT BELOW CORRECTLY REFUSED TO READ INTO "KNOWINGLY CONVERTS", AS USED IN 18 U. S. C. 641, THE INTENT REQUIREMENTS OF COMMON LAW LARCENY

As to the mental state or intent necessary to constitute an offense under 18 U. S. C. 641, the trial judge charged the jury that "The question on intent is whether or not he intended to take the property" (R. 49). At the same time, he refused to give the petitioner's requested instruction that "Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty" (R. 50). The

petitioner asserts error in this charge and in the refusal to charge on the ground that felonious intent, or a subjective evil purpose, is an essential ingredient of the crime with which he was charged under Section 641. Specifically he contends that such an element of felonious intent must be read into the words "knowingly converts to his use or the use of another [property of the United States]" (Pet. br. 17, *et seq.*).[2] We contend, to the contrary, that the charge was correct in that "knowingly converts" requires only proof that the petitioner deliberately and without justification converted to his own use personal property which he knew belonged to the United States.

In effect, petitioner is contending that in 18 U. S. C. 641 the words "embezzles, steals, purloins, or knowingly converts to his use or the use of another," embrace only the common law crimes of embezzlement and larceny. This view was accepted by the dissenting judge below (R. 74–77), who concluded that "the offenses of stealing and purloining property and knowingly con-

[2] The indictment charged that the petitioner "did unlawfully, wilfully and knowingly steal and convert to his own use" etc. Thus, the indictment charged in the conjunctive offenses which, as we will show, the statute defines disjunctively; it is well established that if the evidence supports any one of the offenses thus charged, a conviction will be upheld. *Troutman* v. *United States*, 100 F. 2d 628 (C. A. 10); *United States* v. *Lutz*, 142 F. 2d 985 (C. A. 3); *Pines* v. *United States*, 123 F. 2d 825 (C. A. 8).

verting it to one's use, made punishable by the criminal statute in this case, are all equivalent to common law larceny" (R. 77).

We contend that the court below correctly affirmed the trial judge in his refusal to charge the jury that felonious intent is an essential element of the statutory crime of knowingly converting government property to one's own use. We believe that 18 U. S. C. 641 is not limited to the common law crimes of embezzlement and larceny, but defines as separate and distinct crimes stealing, purloining and the knowing conversion of government property to one's own use, and that whatever may be the precise meaning of "steal" and "purloin" as used in the statute, there is no basis for equating "knowingly converts" to larceny by importing a requirement of felonious intent. The construction of the courts below is compelled by (1) the literal language and disjunctive structure of Section 641, (2) the language and history of statutes from which Section 641 was derived, and (3) the modern tendency to abandon the highly technical aspects of the common law concept of larceny.

1. Section 641 applies to "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another" property of the United States. The disjunctive use of the words "embezzles", "steals", "purloins", "or knowingly converts" alone suggests, as the court below held

(R. 59), "that Congress has, in a single paragraph, defined separate and distinct crimes involving different elements." Moreover, the second paragraph of Section 641 applies to "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined *or converted*" (emphasis supplied); this repeated use of the disjunctive is strong evidence that it was deliberate. Cf. *Dennis* v. *United States*, 341 U. S. 494, 499.

The natural reading of Section 641 is that in addition to whatever offenses are embraced in the words "embezzles, steals, purloins", Congress has created a separate offense consisting of the knowing conversion of government property to one's own use or to the use of another. Thus, even assuming (what we will show to be incorrect) that "steals" and "purloins" embody only the common law conception of larceny requiring a specific criminal intent or purpose, the following phrase, "or knowingly converts to his own use", would be rendered entirely superfluous by reading into it, as petitioner urges, an element of felonious intent which would equate it to larceny.

It is well established that the use of the word "knowingly" in a criminal statute does not necessarily import into it the element of felonious intent, *i. e.*, a conscious purpose to commit the

crime.[3] "Knowingly" is construed normally as requiring only that a person deliberately perform the prohibited act without justification or excuse, his intention to do that act constituting a sufficient criminal intent. *Rosen* v. *United States*, 161 U. S. 29. It is true that a requirement of a specific criminal intent or purpose has been read into "knowingly" in cases where the prohibited transportation or manufacture related to articles which have both innocent and unlawful uses, thus making the purpose of such transportation or manufacture a necessary and decisive element. *Davis* v. *United States*, 62 F. 2d 473, 474 (C. A. 6); *Nosowitz* v. *United States*, 282 Fed. 575 (C. A. 2). Similarly, it would seem that a stricter requirement of intent could be derived from "knowingly", as it was derived from "wilfully" in *Screws* v. *United States*, 325 U. S. 91, if necessary to save a statute from vagueness. Where, as here, such circumstances are absent, "knowingly" should be given its usual meaning unless it appears that only a construction requiring a felonious or specific criminal intent will comport with the legislative purpose underlying Section 641. We show below that such is not the case here.

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[3] Even such terms as "wilfully" and "knowingly and wilfully" are not interpreted as requiring such a specific criminal intent where the context indicates that such a reading would defeat the clear legislative purpose. *Browder* v. *United States*, 312 U. S. 335, 340–342; *Fields* v. *United States*, 164 F. 2d 97, 99–100 (C. A. D. C.), certiorari denied, 332 U. S. 851.

2. Section 641 was derived in the revision of 1948 from the following statutes:

a) 18 U. S. C. 82—"Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin * * * any property of the United States * * *."

b) 18 U. S. C. 87—"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, * * * or other property furnished or to be used for the military or navy service * * *."

c) 18 U. S. C. 100—"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States * * *."

d) 18 U. S. C. 101—"Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined * * *."

The Reviser's Notes to Section 641 state that it is a consolidation of 18 U. S. C. 82, 87, 100 and 101.

In the absence of evidence to the contrary, it is to be presumed that the words and phrases selected for consolidation were taken with their meaning as established by judicial decisions. Thus, it had been held in *Crabb* v. *Zerbst*, 99 F. 2d 562 (C. A. 5), that "steal" as used in 18 U. S. C. 100 is broader than common law larceny. In comparing the former 18 U. S. C. 99 and 100 (Sections 46 and 47 of the old Criminal Code) the Fifth Circuit said (99 F. 2d at 564–565):

> As pointed out above, the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice. In some of these statutes the offense is denominated "theft" or "stealing." No statute offers a clearer example of compromise between the common law and the modern code than the two sections here involved. Section 46 deals with robbery and larceny, the description of the latter being taken from the common law. Section 47 denounces the related offenses which might be included with those described in section 46 under a code practice seeking to avoid the pitfalls of technical pleading. In it the offense of embezzlement is included by name, without definition. Then to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under

the common law, it adds the words *steal or purloin*. That dictionaries use these words in defining larceny, and each of them in defining the other, does not prove that they are synonymous. Larceny is hedged about by its common-law definition. Embezzlement must be considered to have its classical meaning and to stand at the opposite extreme of the offenses dealt with in these two sections. Between them there lies a gap which has grown wider and wider as the multifarious activities of the central government have spread and increased. Stealing, having no common-law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word *purloin*. We do not intend to delineate the differences in meaning of these words. It is sufficient for this case to say that there are shades of difference in meaning, and that Congress used them with these differences in view.

Similarly, in *United States* v. *Handler*, 142 F. 2d 351, 353 (C. A. 2), certiorari denied, 323 U. S. 741, it was noted that "in various federal statutes the word 'stolen' or 'steal' has been given a meaning broader than larceny at common law." In that case, it was held that by the use of those words "the National Stolen

Property Act was not restricted to the transportation of property taken larcenously. * * * In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods or securities belonging to another with the intent to deprive the owner of the rights and benefit of ownership." Also, in *United States* v. *DeNormand*, 149 F. 2d 622 (C. A. 2), certiorari denied, 326 U. S. 756, rehearing denied, 326 U. S. 808, 811, 327 U. S. 816; certiorari denied, 330 U. S. 822, rehearing denied, 330 U. S. 854, it was said that "steals" as used in what is now 18 U. S. Code 659 has a broader scope than common law larceny; it was held therefore, that the asportation which was an essential ingredient of larceny need not be proved under a charge of stealing. Contra, *United States* v. *Cohen*, 274 Fed. 596, 597 (C. A. 3).[4]

The phrase "knowingly converts to his use" as employed in Section 641 was derived from the phrase "Whoever shall steal, embezzle, or knowingly apply to his own use" in the former 18 U. S. C. 87. That statute originated in the Act of March 2, 1863 (12 Stat. 696), which, while dealing largely with fraud, also penalized

[4] The lower federal courts are divided as to whether "stolen" as used in the National Motor Vehicle Theft Act has a broader meaning than "larceny." Compare, e. g., *United States* v. *Adcock*, 49 F. Supp. 351 (W. D. Ky.), with *Hite* v. *United States*, 168 F. 2d 973 (C. A. 10). The question in these and similar cases is whether "stolen" includes automobiles as to which both possession and title were obtained by fraudulent means, as by giving a bad check to the owner.

"any person in said [armed] forces or service who shall *steal, embezzle, or knowingly and willfully misappropriate or apply to his own use or benefit,* or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States" etc. (italics supplied). The legislative history of the original statute supports only the general conclusion that Congress, indignant over large-scale frauds and depredations in the supplying of the Northern armies, enacted this statute to protect the government's military stores.[5] It is fair to assume that the wartime 38th Congress was not concerned with perpetuating the common-law niceties of larceny. In the 1874 revision of the statutes (Rev. Stat. 5439), the phrase in question was changed to read "knowingly applies to his own use." No reason was given for the deletion of "willfully."

Under the earlier statute, the words "knowingly apply to his own use" always were given a meaning disjunctive to that of the preceding words, "steal" and "embezzle." *Horowitz* v. *United States,* 262 Fed. 48, 50 (C. A. 2), certiorari denied, 252 U. S. 586; *Adolfson* v. *United States,* 159 F. 2d 883, certiorari denied, 331 U. S. 818. In the *Adolfson* case, the Ninth Circuit rejected a contention that

[5] 63 Cong. Globe 952 *et seq.*

"to knowingly apply to his own use" is the equivalent of "embezzle," as follows (at 885):

> * * * His argument is that section 87 "is purely an embezzlement statute" (referring to its title); that the indictment charges embezzlement and nothing more and that to "apply the property of another to one's own use" is to embezzle it. The simple language of section 87 refutes that argument for it covers several specifically named offenses wholly apart and divorced from the technical offense of embezzlement. One of these specifically and separately named offenses is that of knowingly applying to one's own use property "furnished or to be used for the military or naval service." The prohibition against knowingly applying Government property appears in the text of section 87 after the word "or" which follows the reference to the offense of embezzlement. The use of the word "or" clearly indicates alternative circumstances * * * and was obviously intended to identify and define a wholly separate and distinct offense, and we so hold. Appellant would have us read out of section 87 a meaning, a purpose, a definition and a protection of public property which to us clearly appears to speak the plain intent of the lawmakers.

Again it will be noted that the former 18 U. S. C. 99 applied to "Whoever shall rob another of any kind or description of personal

property belonging to the United States, *or shall feloniously take and carry away the same* * * *" (italics supplied). In the revision of 1948, the prohibition of robbery was transferred to the present Section 2112, while the phrase "feloniously take and carry away," which had been construed as meaning common law larceny in *Crabb* v. *Zerbst, supra,* p. 19, was "omitted as covered by section 641 of this title" (Reviser's Notes to Section 2112).

In brief, the present Section 641 was drafted with full knowledge as to what language would be construed to cover only common law larceny, with the knowledge that the words "steal" and "purloin" had been construed as having a broader coverage than larceny, and with the knowledge that the disjunctive use of "knowingly converts to his use" would be interpreted literally as defining a crime in addition to stealing and embezzlement. Thus, there is no basis for concluding that Congress intended in Section 641 to prohibit only common-law larceny and embezzlement of government property. The number and varied language of the statutes codified into Section 641 make it clear that that section as a whole should be interpreted to apply to any person who deliberately and without justification deprives the United States of the use of its personal property for the benefit of himself or some other person.

Moreover, the words "knowingly converts" on their face indicate a legislative purpose to pro-

scribe as a crime what would otherwise constitute merely the tort of conversion. It would seem that the phrases "misappropriate or apply to his own use", "apply to his own use" and "knowingly converts to his use", as variously used since 1863, are equivalent, and that all invoke the concept of conversion as developed in the law of torts and bailments, rather than the criminal law's refined concept of larceny. See, *e. g.*, Story's *Commentaries on the Law of Bailments* (7th ed. 1863) sections 85–87. Obviously, taking and selling the personal property of the United States constitutes a conversion (1 *Restatement of Torts*, secs. 223, 236), and the criminal offense defined in Section 641 is committed if the taker knows or has reason to know that the property belongs to the United States.

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[8] 18 U. S. C. 654 employs the words "embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee,". "Wrongfully converts" as there used has been construed as practically equivalent to embezzlement. *Hubbard* v. *United States*, 79 F. 2d 850 (C. A. 9). 18 U. S. C. 656 contains the verbs "embezzles, abstracts, purloins or willfully misapplies any of the moneys * * * [of banks]." This Court has stated, in *United States* v. *Britton*, 107 U. S. 655, 669, that, "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the word 'embezzle' as used in the statutes, or the words "steal, take and carry away," as used at common law."

3. Such a literal construction of Section 641, which ascribes to the disjunctive words "knowingly converts to his use" the definition of a crime in addition to common law larceny and embezzlement, is consistent with the modern statutory development in this class of offenses. Historically, the harsh penalties applied to larceny impelled English judges to give larceny a strict and technical definition in terms of intent, asportation, and method of obtaining possession, which left outside its scope many deliberate interferences with the possession and enjoyment of property. With the development of a more humane penology, no such reason remains for reading into modern statutes for the protection of property the technical requirements of common law larceny (or embezzlement). The enormous variety and volume of Government-owned personal property, stored under many different conditions throughout the country, and under the management of thousands of employees, present problems of protection and preservation unknown to any private owner. Clearly, it was these factors that impelled Congress, in enacting the variety of statutes which were codified into Section 641, to provide more protection for property of the Federal Government than is afforded by the common law concepts of larceny and embezzle-

ment. Indeed, Congress could make criminal the conversion of government property without any element of knowledge or scienter. *United States* v. *Balint*, 258 U. S. 250; *United States* v. *Behrman*, 258 U. S. 280. In view of the continued effort of Congress to provide greater protection for government property, restriction of the application of the statute to one who "knowingly converts to his use," can mean only that he must have knowledge of the Government's ownership of the property involved, not that the statute must be equated to technical common law larceny and embezzlement.

In the present case, the petitioner admitted that he took and sold the bomb casings without inquiry. He knew that they had belonged to the United States, but he asserts (1) that the casings had been abandoned, and (2) that in any event he was justified in believing that the casings had been abandoned. Accordingly, he contends that both of these issues should have been submitted to the jury. If, as we contend, neither of these defenses was legally and factually sufficient, then, on his own admission, he possessed such knowledge of the Government's ownership of the casings as to subject him to prosecution as one who "knowingly converts to his use" property of the United States.

II

THE TRIAL JUDGE PROPERLY REFUSED TO SUBMIT TO THE JURY THE QUESTION OF WHETHER THE UNITED STATES HAD IN FACT ABANDONED THE BOMB CASINGS.

The petitioner seems to contend (Pet. 3, Br. 32) that the trial court erred in not allowing the jury to determine whether the United States had in fact abandoned the bomb casings. We contend to the contrary, not only that there was no evidence of intent by the Government to abandon its property, so as to permit the issue of actual abandonment to go to the jury, but also that as a matter of law abandonment of property by the United States cannot be inferred.

1. To establish abandonment, it is necessary to show both acts indicating physical abandonment and an actual intent to abandon. *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 597–598; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 31; *Helvering* v. *Jones*, 120 F. 2d 828, 830 (C. A. 8); *Carter Oil Co.* v. *Mitchell*, 100 F. 2d 945, 951–952 (C. A. 10); *International Finance Corporation* v. *Jawish*, 71 F. 2d 985, 986 (C. A. D. C.). Assuming, *arguendo*, that the location and condition of the casings constituted circumstances indicating the ex-

ternal act of abandonment,[7] the petitioner in no way met the Government's undisputed evidence that there was no intent to abandon the casings. Thus, the commanding officer of the Oscoda Air Base testified that he had no authority to dispose of the casings (R. 8). Moreover, another witness testified that the Oscoda Chamber of Commerce and Agriculture had been unable to obtain permission to take the casings for its scrap drive (R. 5).[8] In view of this evidence to the

[7] We do not concede that the location and condition of the casings constitutes any evidence of an external act of abandonment. The photographic exhibits filed with the Court establish only the conceded fact that the casings were scrap metal. Steel scrap is a commodity for which there is an established market. For example, the prevailing price for the basic grade of steel scrap delivered at Pittsburgh on December 1, 1948, was $49.00 per ton. *N. Y. Times*, December 2, 1948. The fact that the Government or any other landowner leaves steel scrap lying about for a long period of time simply reflects the economics of the industry. "The principal suppliers of ferrous scrap purchased by domestic steel mills are the railroads, the automotive industry, and other large industrial steel consumers." "When the demand and price are sufficiently strong, it is profitable to collect scrap in smaller communities and at points farther from domestic consuming centers or ports of export, even though such movements involve substantial transportation costs." "Some areas remote from the large steel plants are drawn upon only when prices become sufficiently high to cover costs of collecting, sorting, and transporting to consuming centers, and to leave a reasonable margin of profit." *Iron and Steel*, U. S. Tariff Commission Report No. 128, 2d Series (1938) pp. 320, 322, 125.

[8] The Department of the Air Force has advised us that it sells as scrap metal the used practice bomb casings accumulated on its bombing ranges.

effect that there was no intent to abandon the bomb casings and the total lack of evidence to prove such an intent, the trial judge correctly refused to permit the jury to speculate as to whether the casings had in fact been abandoned. *Kister Oil Development Corp.* v. *Young,* 27 F. 2d 433, 437 (W. D. Ky.); *Wilmore Coal Co.* v. *Brown,* 147 Fed. 931, 943 (C. C. W. D. Pa.); *Paine* v. *Griffiths.* 86 Fed. 452, 456 (C. A. 3); *Ferguson* v. *Ray,* 44 Ore. 557, 567; *Worsham* v. *State,* 56 Tex. Crim. 253, 260.

2. Also, we believe that abandonment of personal property by the United States cannot be inferred from circumstances, as it may be in the case of private owners. Such a conclusion would seem to be a necessary corollary to the established rule that title to land cannot be acquired by prescription or adverse possession against the United States. *United States* v. *California,* 332 U. S. 19, 39–40. Loss of ownership of personal property by abandonment is comparable to the loss of ownership of real property through adverse possession. A claim of abandonment by the United States, like a claim based upon adverse possession, is inconsistent with the exclusive power of Congress to dispose of the property of the United States. *Jourdan* v. *Barrett,* 4 How. 168, 184, and with the related principle that the United States cannot be deprived of its property rights through the action or inaction of its officers. *United States* v. *California, supra.*

We believe, therefore, that it would have been error for the trial judge to have permitted the jury to find actual abandonment of the bomb casings by the United States, except in accordance with procedures authorized by Congress.[9]

III

THE TRIAL JUDGE PROPERLY REFUSED TO SUBMIT TO THE JURY THE PETITIONER'S DEFENSE THAT HE BELIEVED THE BOMB CASINGS HAD BEEN ABANDONED

The petitioner's principal attack upon his conviction is that the trial judge refused to charge the jury, and refused to permit the petitioner's counsel to argue to the jury, that if they found that the petitioner had believed that the casings had been abandoned (as distinguished from actual abandonment), they should acquit him. The requested charge was as follows (R. 50):

> The question is: What was in Mr. Morissette's mind at the time he took it?

[9] Pursuant to Sections 2 and 14 of the Surplus Property Act of 1944 (50 U. S. C. App. 1611, 1623) the Department of the Air Force, as the owning agency was empowered to dispose of scrap materials, subject to any regulations which might be promulgated by the Surplus Property Administrator (later, the War Assets Administrator). By regulations which became effective September 1, 1948, disposal agencies, such as the Department of the Air Force with respect to its scrap materials, were empowered to abandon or destroy personal property upon written findings "by a responsible officer, approved by a reviewing authority." 44 C. F. R. 402.18. No such procedure was followed with respect to the bomb casings here involved.

> Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.
>
> Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

We submit that the trial judge correctly refused so to charge the jury.

While petitioner testified that he thought that the casings had been abandoned, he also testified that he knew that the casings were on government land. (R. 35.) He did not even claim that he had made any inquiry at the Air Base as to whether the casings had been abandoned. Thus, petitioner's position is that he can justify the taking of personal property from the owner's land by saying that he thought such property was abandoned—even though he made no inquiry of the known owner as to whether it actually had been.

No cases have been found in which it was sought to defend a charge of larceny or, as here, statutory conversion, upon the ground that the defendant mistakenly believed that chattels lying upon another man's land had been abandoned. However, a persuasive analogy is found in the law of larceny as applied to finders. It has long been the law both in England and in the United

States that a finder of chattels who does not make a reasonable effort to discover the true owner is guilty of larceny. Thus, in *Regina* v. *Reed*, 1 Car. & M. 306 (1842) where a charge of larceny was based upon finding money in the street, Justice Coleridge stated (p. 307) that:

> If the circumstances under which property is found to be such that the ownership has been abandoned, the thing is bonum vacans, and any one may take it; but if the ownership be not abandoned, the thing is not the property of the finder: if, in addition to this, the person who finds it shows no intention to find out the owner, or to return it, that person is guilty of larceny.

In *Regina* v. *Peters*, 1 Car. & K. 245 (1843), involving a conviction for larceny of a finder of jewelry, Baron Rolfe declared (p. 247) that:

> If a man is possessed of a chattel, he does not lose the property in it because he places or drops it in a field. Nay, if he drop it in a street, it still remains his property. The only case where a party can be justified in converting it to his own use is, where it has fallen or dropped where a party may fairly say the owner has abandoned it; or if the party cannot be found to whom it belonged. If I had an apple, and dropped it, it might be presumed that I abandoned it; but if I drop £500, the presumption is, that I do not mean to abandon it. If I drop a thing where there is no reasonable means of finding out that it belongs to me, then,

> though I am found out to be the owner, the party finding it would not be guilty of felony, if he converted it to his own use; though he would be liable to an action of trover. But it is perfectly well known that, if a person leave any thing in a stage-coach, if the owner can be found by inquiry, the party finding the thing, and appropriating it to his own use, is guilty of larceny. So, if it is found in a street, and there is any mark by which the owner can be discovered. So, in the case where a gold ornament is found at the door of a house, it is ridiculous to say that any person picking it up would not suppose that it belonged to the owner of the house.

Accord, *Regina* v. *Coffin,* 2 Cox. C. C. 44 (1846) (finder of money in a theatre).

In the United States, it is generally held that a finder of lost property will be guilty of theft or larceny where the surrounding circumstances give him knowledge or means of inquiry as to the true owner. *Griggs* v. *State,* 58 Ala. 425; *People* v. *Waggoner,* 388 Ill. 468, 58 N. E. 2d 533; *Perdew* v. *Commonwealth,* 260 Ky. 638, 86 S. W. 2d 534. In such states as New York, California and Oklahoma, the rule is established by statute.[10] A Michigan

[10] New York Penal Code, section 1300; California Penal Code, section 485; 21 Oklahoma Statutes Ann., section 1702. The New York statute, which is typical, is as follows:

> A person, who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his

statute requires a finder to search for the true owner by advertising in newspapers.[11] Under the Michigan statute, it was held that one who found goods on land which he had leased was not excused from this duty to seek out the owner. *People* v. *Harmon*, 217 Mich. 11, 185 N. W. 679.[12]

The dissenting judge below cited *Johnson* v. *State*, 36 Tex. 375, and *Jordan* v. *State*, 107 Tex. Cr. 414, 296 S. W. 585, for the proposition that "where one takes personal property into his possession in the honest belief that it is abandoned by its owner, he is not guilty of larceny" (R. 83). However, *Johnson* v. *State*, *supra*, involved a clear case of property which had been actually abandoned (a pony on open range for years with no known owner). In *Jordan* v. *State*, *supra*, it was held that the issue of the defendant's belief that the property had been abandoned should have been submitted to the jury. There the defendant had taken for his own use parts of an automobile which had been burned, left alongside the road, later pushed into a nearby creek, and partially stripped of parts by other persons. The case does not discuss whether one believing prop-

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own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny.

[11] Michigan Statutes Ann., section 18.702.

[12] See, generally, Riesman, *Possession and the Law of Finders*, 52 Harv. L. R. 1105, 1130–1133 (1939).

erty to be abandoned is under the duty to make inquiry which is imposed upon a finder. Moreover, on its facts, the case is far from authority for the proposition urged by petitioner that A taking goods from land which he knew belonged to B can defend on the ground that he thought B had abandoned the goods.

We believe that the finding and abandonment situations are so similar that the same principles should govern both. When Congress proscribes as a crime conduct which includes larceny, the Federal courts may properly give effect to such a universally concomitant common law principle as the duty of inquiry placed upon finders. *Jerome* v. *United States*, 318 U. S. 101, 108. As to finders, the law is well established that they must utilize such knowledge and avenues of inquiry as to the true owner as are provided by the surrounding circumstances—such as the place of finding. The purpose of this rule is to protect the rights of true owners as far as possible. Similarly, before one can defend a taking of property on the ground that he thought it was abandoned, he should be required to show that he took advantage of the knowledge afforded by the circumstances to ascertain whether the property was in fact abandoned. Specifically, before one can be heard to say that he thought chattels upon the land of a known owner were abandoned, he

must show at the very least that he attempted to communicate with the land owner The fact that the chattels are on the land of a known owner gives the same notice of probable or possible ownership as does a name card in a wallet found on the street.[13]

Since the petitioner here admittedly knew that the United States owned (or had leased) the land on which the casings were located, and since he did not even claim that he had inquired as to whether the casings were actually abandoned, his defense of a belief that they had been abandoned was legally insufficient. Since his defense was insufficient as a matter of law, the trial judge properly refused to submit it to the jury. Stated otherwise, absent any evidence that petitioner had inquired as to whether the United States had abandoned the casings, his defense of a belief in abandonment was properly withheld from the jury. *Rosen* v. *United States,* 161 U. S. 29, 41; *Agnew* v. *United States,* 165 U. S. 36, 53–54; *Cantwell* v. *United States,* 81 F. 2d 31 (C. A. 9); *Bloch*

[13] While the English courts have not had occasion to consider the precise question here involved, they have in general refused to recognize claims to lost or abandoned chattels asserted by trespassers on the land upon which the chattels were lost or abandoned. A recent case is *Hibbert* v. *McKiernan* [1948] 2 K. B. 142, upholding a conviction for theft where the defendant, a trespasser, had picked up from a club golf course balls which had been lost and abandoned by club members.

United States, 158 F. 2d 519 (C. A. 5), certiorari denied, 330 U. S. 837. The last two cited cases hold that in the absence of evidence of entrapment a trial judge should keep the issue of entrapment from the jury. Similarly, the trial judge properly refused to permit the petitioner's counsel to argue to the jury the defense of belief of abandonment which was legally insufficient under the evidence for the reasons stated above. *Hill* v. *United States*, 22 App. D. C. 395; *Henry* v. *United States*, 273 Fed. 330 (C. A. D. C.), certiorari denied, 257 U. S. 640; American Law Institute, *Code of Criminal Procedure* (1930) Section 322. Thus, in the *Hill* case, the defendant's counsel was not allowed to argue the defense of insanity to the jury, where no evidence had been introduced on that issue.

It is to be noted that under this analogy to the law of finders the petitioner's defense that he believed the casings to be abandoned property would be legally insufficient even against a charge of common law larceny with its requirement of felonious intent which petitioner would read into Section 641. Under a charge of knowing conversion to his own use, under which felonious intent need not be proved, the defense is insufficient *a fortiori*.

IV

THE TRIAL JUDGE CORRECTLY REFUSED TO INSTRUCT THE JURY THAT AN OPEN AND NOTORIOUS TAKING WOULD CREATE A "STRONG PRESUMPTION" THAT THE PETITIONER LACKED A FELONIOUS INTENT.

At the trial, the trial judge refused to give the following charge as requested by the petitioner (R. 50):

> If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized.

The requested charge was properly refused for several reasons.

First, "felonious intent" is not an element of "knowingly converts to his own use," the charge upon which the petitioner was convicted. The decisions which hold that such an instruction should be given are based upon a distinction between larceny and trespass or forcible trespass. *McMullen* v. *State*, 53 Ala. 531; *Lawson* v. *State*, 161 Miss. 719, 138 So. 361; *State* v. *Coy*, 119 N. C. 901, 26 S. E. 120. This distinction partly reflects the common law rule that a taking of personal property followed by a conversion to the taker's use does not constitute larceny unless the taking was accompanied by an intent to deprive the owner of his property. However, we

have seen that Section 641 covers not only common-law larceny but also any deliberate conversion of government property.

Moreover, the decisions make it clear that an open and notorious taking will support an inference of lack of felonious intent only when such a taking is accomplished by a claim of title or right made in good faith in the presence of the owner or other persons. *People* v. *Jones*, 61 Cal. App. 2d 608, 143 P. 2d 726, appeal dismissed, 323 U. S. 665; *State* v. *Williams*, 163 Wash. 419, 1 P. 2d 307; reheard, 166 Wash. 704, 8 P. 2d 1118. The purpose of these limitations is to minimize the opportunity for the fabrication of evidence of innocence, opportunity which is inherently absent where the conduct involved, such as flight, indicates guilt. Wigmore, *Evidence* (3d ed.), sec. 293. Even under a charge of larceny, no such inference of good faith could be drawn in this case if, as we contend, the petitioner was under a duty to inquire of the known owner whether the casings had actually been abandoned. Nor could such an inference be drawn if, as we believe, no one can be heard to say that he believed that the United States had abandoned its property. Also, it seems clear that even under a charge of larceny, the petitioner's taking of the casings was neither so open, nor accompanied by such a public claim of title or right, as to justify his requested instruction that there existed a "strong presumption" that he lacked a "felonious intent."

V

THE TRIAL JUDGE DID NOT INVADE THE PROVINCE OF THE JURY

The petitioner's final contention is that the trial judge, by his charge to the jury, practically directed a verdict of guilty and thus usurped the jury's function. The pertinent portion of the charge reads as follows (R. 48–49):

> I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty.
>
> * * * * *

> The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.

We believe that the charge was unobjectionable or, at the most, involves only harmless error, as the court below held (R. 62).

The petitioner had testified that he had taken the casings from land which he knew belonged to the United States without making any inquiry as to whether the casings had been abandoned. If, as we contend, felonious intent was not an element of the crime with which petitioner was charged, and if his asserted belief of abandonment was a legally insufficient defense, the trial judge correctly instructed the jury that the undisputed facts constituted a knowing conversion of government property in violation of Section 641. Here, as in *Horning* v. *District of Columbia,* 254 U. S. 135, under the undisputed and admitted facts the petitioner's voluntary acts amounted to the commission of the offense charged. In that case, the trial judge not only told the jury that the admitted facts constituted an offense, but added that a failure to bring in a verdict could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. Obviously, the trial judge in this case did not go nearly as far as in *Horning,* and in addition he took pains to inform the jury

that "You can go up there and come down and say not guilty * * * because you are the judges of the facts" (R. 48). The instant case is clearly unlike *Murdock* v. *United States,* 290 U. S. 389, 394–398, where it was held that since the offense there charged required the jury to find a specific criminal intent or bad purpose, undisputed evidence as to the defendants voluntary acts did not permit the trial judge to express such an opinion as was upheld in *Horning.* Neither does the instant case resemble *Billeci* v. *United States,* 184 F. 2d 394, 401 (C. A. D. C.) in which the *Horning* rule was held to be inapplicable to "a case in which all the evidence is given by witnesses presented by the Government but the defense does not concede that the essential evidence is true." Here, the facts as testified to by the petitioner constitute the offense of knowingly converting to his own use property of the United States, and the trial judge merely so advised the jury, leaving them free to render any verdict they chose.

At the most, as in *Horning* v. *District of Columbia,* 254 U. S. 135, 138–139, "Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it

was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt."

As the court below concluded (R. 62): "To reverse and remand for a new trial because of the expressions of the district judge in his charge would be to ignore the spirit as well as the letter of Rule 52 (a) of the Federal Rules of Criminal Procedure respecting harmless error. That rule provides: 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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